

SC93296

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

TYOKA L. LOVELADY,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri,
16th Judicial Circuit
The Honorable W. Brent Powell, Judge
Division 11

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Tyoka L. Lovelady was convicted after a bench trial in the Circuit Court of Jackson County of one count of possession of a controlled substance, Section 195.202, RSMo 2000. On August 19, 2011, the Honorable W. Brent Powell, Judge of Division 11, sentenced Mr. Lovelady to two years in prison, suspended the execution of sentence, and placed Mr. Lovelady on probation for two years. A timely notice of appeal was filed on August 19, 2011.

On February 19, 2013, the Court of Appeals, Western District, reversed Mr. Lovelady's conviction and sentence and remanded for a new trial. The state filed a motion for rehearing, which the Court of Appeals denied. On May 28, 2013, this Court sustained the state's application for transfer to the Missouri Supreme Court. The Missouri Supreme Court has jurisdiction to hear this case. Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

The state charged Tyoka L. Lovelady with one count of possession of a controlled substance, Section 195.202, RSMo 2000 (L.F. 8-9). Trial counsel filed a pretrial motion to suppress cocaine base found in Mr. Lovelady's pocket after he was detained by police officers on the night of May 30, 2009 (L.F. 10-12). The trial court held a hearing on the motion to suppress on June 17, 2011 (Tr. 2, 5). Evidence adduced at the hearing on the motion to suppress was as follows.

May 30, 2009, was the Saturday of Memorial Day weekend (Tr. 54). Around 10:45 p.m., Officers Chris Smith and Chad Fenwick of the Kansas City Police Department were on patrol in the area of 11th and Agnes in Kansas City, Jackson County, Missouri (Tr. 7-10, 20, 56-57). The area was residential and consisted mostly of single family houses, along with some apartment buildings (Tr. 20-21, 59). Some of the houses were dilapidated or abandoned (Tr. 59). In Officer Fenwick's opinion, the area had a lot of drugs, guns, prostitution and crime (Tr. 57-58).

While on patrol, the officers saw a man on a bicycle; he was riding leisurely circles in the intersection at 11th and Agnes (Tr. 9, 10, 20, 22, 33-34, 59-60). He was not popping wheelies or doing anything daring on the bicycle (Tr. 22). The man was later identified as Appellant, Tyoka L. Lovelady (Tr. 18, 59). Mr. Lovelady lived in the same block, at 1021 Agnes (Tr. 20-21). As they drove closer, Officer Smith could see something sticking out of the side of the man's waistband (Tr. 10).

Officer Smith made eye contact with Mr. Lovelady, and Mr. Lovelady made a movement of some sort that caught Officer Smith's attention (Tr. 10, 21, 34-35). Officer

Smith heard Mr. Lovelady say, “They went that way” as he pointed west down 11th Street (Tr. 10-11, 13). Officer Smith said that he tried to get more information from Mr. Lovelady, but Mr. Lovelady was unable to describe anything (Tr. 10).

When Mr. Lovelady moved his hands, Officer Smith saw that the item sticking out of his waistband appeared to be a gun (Tr. 11-12, 13, 21-22). Officer Smith told Officer Fenwick that he thought that Mr. Lovelady had a gun (Tr. 11-12). Officer Fenwick stopped the car and backed up (Tr. 61-62). The officers immediately got out of their car, drew their guns on Mr. Lovelady, and told him to get on the ground (Tr. 11-12, 13-14, 23, 61-62). Mr. Lovelady immediately complied (Tr. 12, 23-25).

Within a matter of seconds, Mr. Lovelady was on the ground, Officer Smith had the gun, and Mr. Lovelady was in handcuffs (Tr. 11-13, 14-15, 24-25). Officer Fenwick kept his gun pointed at Mr. Lovelady (Tr. 12, 14).

Mr. Lovelady was cooperative and did not resist or say or do anything threatening (Tr. 24-25, 62-63). Officer Smith believed that Mr. Lovelady was under the influence of “some kind of foreign substance to his body” (Tr. 12-13, 24-25), but Officer Smith did not document that observation in his police report (Tr. 53).

Officer Fenwick described it as uncommon to see someone riding a bicycle at 11th and Agnes at 11:00 at night, even though it was a residential area (Tr. 59, 72). Both officers said that the reason they stopped and got out was because Mr. Lovelady appeared to have a gun (Tr. 40-41, 63-64).

Once Mr. Lovelady was in handcuffs, the officers made him stand up and they took him to the front of their patrol car (Tr. 14-15). The officers examined the gun and

found that it was an Airsoft gun (Tr. 16, 26, 43-44). An Airsoft gun fires plastic BBs but does not use gunpowder (Tr. 16-17, 26, 27-28). An Airsoft gun is a toy gun, not designed to be lethal (Tr. 26-27). It is not illegal to have a toy gun (Tr. 26-27, 28, 73).

The officers asked Mr. Lovelady questions to determine whether he had actually seen anything the officers should know about, but Mr. Lovelady was not able to describe anything (Tr. 15-16). Once Mr. Lovelady was in custody, Officer Smith intended on detaining Mr. Lovelady to find out if he had warrants, to get more information about him, and to find out if he needed to do anything else with Mr. Lovelady, regardless of whatever Mr. Lovelady told him (Tr. 41-42). The officers conducted a computer check and learned that Mr. Lovelady had a pickup order (Tr. 15, 29, 71). The officers did not know why the pickup order was in place (Tr. 30-31).

Once the officers learned of the pickup order, Mr. Lovelady was “under arrest” (Tr. 16). The officers searched Mr. Lovelady for other weapons or illegal substances (Tr. 16). Officer Smith found a white rock substance and a kitchen knife in Mr. Lovelady’s pockets (Tr. 16, 46). The officers then called a supervisor to come out and field test the white rock substance (Tr. 17, 49-50). The white substance tested positive for the presence of cocaine (Tr. 18). The officers told their supervisor that the gun was “a fake” (Tr. 43-44).

The officers called for a police van to transport Mr. Lovelady to the detention center (Tr. 17, 44-45). Mr. Lovelady was not released or told that he was free to go once he was handcuffed (Tr. 45).

The trial court watched the dashcam video recording of the incident of May 30, 2009 (Tr. 78, 81; Defendant's Exhibit 3).

On July 7, 2011, the trial court overruled the motion to suppress (L.F. 13-15). The trial court found:

According to their testimony, one of the arresting officers observed Defendant on a bicycle with what appeared to be a pistol in his waistband area. The officers stopped Defendant and detained him while they determined the nature of the weapon. After detaining him, the officers learned that the weapon was in fact a toy gun. Immediately thereafter, the officers contacted dispatch with Defendant's identification information and learned that Defendant had an outstanding warrant. (L.F. 13).

The court noted that defense counsel had pointed out several inconsistencies between the officers' testimony and the dashcam video and audio, suggesting that the officers' testimony was not credible (L.F. 13). The court found that the officers were credible and that the inconsistencies did not suggest that Mr. Lovelady's detention was unlawful (L.F. 13-14).

Trial defense counsel filed a motion to reconsider the motion to suppress (L.F. 16). Among the grounds for reconsideration was that the officers exceeded the scope of a brief, investigatory stop when they sought information about whether Mr. Lovelady had any outstanding warrants (L.F. 16-31).

On August 10, 2011, the trial court issued a second order denying Mr. Lovelady's motion to suppress the physical evidence (L.F. 32-33). The court again found that the

officers quickly determined that the “pistol” was a toy gun (L.F. 33). The court found that even after they determined that the gun was a toy, the officers continued to have a reasonable suspicion to detain Mr. Lovelady (L.F. 33).

The case was tried to the court on stipulated facts on August 19, 2011 (L.F. 7, 35, 36-37; Tr. 3, 105). The court considered the evidence presented at the motion to suppress hearing and the parties agreed that the substance taken from Mr. Lovelady’s pocket was .83 gram of cocaine base (Tr. 106-107, 111-112). The court allowed a continuing objection to the admission of the physical evidence (Tr. 111-112). The court overruled Mr. Lovelady’s motions for judgment of acquittal at the close of the state’s case and at the close of all the evidence (Tr. 113).

The court found Mr. Lovelady guilty of possession of a controlled substance (L.F. 36-37; Tr. 114). The court sentenced Mr. Lovelady to two years in prison, suspended execution of the sentence, and put Mr. Lovelady on probation for two years (L.F. 36-37; Tr. 117). This direct appeal follows (L.F. 39).

POINT RELIED ON

The trial court clearly erred in overruling Appellant's motion to suppress physical evidence and in ruling that the state could present evidence about the discovery, seizure, and testing of the cocaine base, because the evidence was obtained as a result of Appellant's unlawful search and seizure and therefore should have been excluded as fruit of the poisonous tree, in that Appellant was denied his rights to be free from unreasonable searches and seizures and to due process of law, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 15 of the Missouri Constitution, in that once the officers who detained Appellant took the gun and determined that it was a toy, the purpose of the stop was satisfied and there was no justification for Appellant's continued detention or for the subsequent computer check for warrants.

Terry v. Ohio, 392 U.S. 1 (1968);

State v. Grayson, 336 S.W.3d 138 (Mo. 2011);

State v. Taber, 73 S.W.3d 699 (Mo. App. W.D. 2002);

U.S. Const., Amend. IV, V and XIV;

Mo. Const. Art. I, §§ 10 and 15; and

Sections 195.202 and 542.296, RSMo 2000.

ARGUMENT

The trial court clearly erred in overruling Appellant's motion to suppress physical evidence and in ruling that the state could present evidence about the discovery, seizure, and testing of the cocaine base, because the evidence was obtained as a result of Appellant's unlawful search and seizure and therefore should have been excluded as fruit of the poisonous tree, in that Appellant was denied his rights to be free from unreasonable searches and seizures and to due process of law, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 15 of the Missouri Constitution, in that once the officers who detained Appellant took the gun and determined that it was a toy, the purpose of the stop was satisfied and there was no justification for Appellant's continued detention or for the subsequent computer check for warrants.

The trial court clearly erred in overruling Tyoka Lovelady's motion to suppress physical evidence and in ruling that the state could present evidence about the discovery, seizure, and testing of the cocaine base. The physical evidence was obtained as a result of an unlawful search and seizure and therefore should have been excluded as fruit of the poisonous tree. Mr. Lovelady was denied his rights to be free from unreasonable searches and seizures and to due process of law, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 15 of the Missouri Constitution. Once the officers who detained Mr. Lovelady took the gun and determined that it was a toy, the purpose of the stop was satisfied. Mr.

Lovelady's continued detention and the subsequent computer check for warrants were not justified.

Standard of Review

When reviewing a motion to suppress, this Court examines the record made at the motion to suppress hearing, as well as the trial record, to determine whether sufficient evidence exists in the record to support the trial court's ruling. *State v. Grayson*, 336 S.W.3d 138, 142 (Mo. 2011). An appellate court will reverse the trial court's ruling on a motion to suppress if that ruling is clearly erroneous. *Id.* The appellate court defers to the circuit court's factual findings and credibility determinations and inquires only as to whether the decision is supported by substantial evidence. *Id.* Legal determinations of reasonable suspicion, probable cause, and whether the conduct in issue violates the Fourth Amendment are reviewed *de novo*. *Id.*; *State v. Long*, 303 S.W.3d 198, 201 (Mo. App. W.D. 2010).

Preservation

The state charged Tyoka L. Lovelady with one count of possession of a controlled substance, Section 195.202, RSMo 2000 (L.F. 8-9). Defense counsel filed a pretrial motion to suppress cocaine base found on Mr. Lovelady after he was detained by police officers on the night of May 30, 2009 (L.F. 10-12). The motion alleged that the evidence was obtained through an unlawful search and seizure in violation of Mr. Lovelady's rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 15 of the Missouri Constitution (L.F. 10-12). The trial court held a hearing on the motion to suppress on June 17, 2011 (Tr. 2, 5).

On July 7, 2011, the trial court overruled the motion to suppress (L.F. 13-15). Defense counsel filed a motion to reconsider the motion to suppress (L.F. 16). Among the grounds for reconsideration was that the officers exceeded the scope of a brief, investigatory stop when they sought information about whether Mr. Lovelady had any outstanding warrants (L.F. 16-31). On August 10, 2011, the trial court issued a second order denying Mr. Lovelady's motion to suppress the physical evidence (L.F. 32-33).

The case was tried to the court on stipulated facts on August 19, 2011 (L.F. 7, 35, 36-37; Tr. 3, 105). The court considered the evidence presented at the motion to suppress hearing and the parties agreed that the substance taken from Mr. Lovelady's pocket was .83 grams of cocaine base (Tr. 106-107, 111-112). The court allowed a continuing objection to the admission of the physical evidence (Tr. 111-112). The court overruled Mr. Lovelady's motions for judgment of acquittal at the close of the state's case and at the close of all the evidence (Tr. 113). The court found Mr. Lovelady guilty of possession of a controlled substance and sentenced Mr. Lovelady to two years in prison, suspended execution of the sentence, and put Mr. Lovelady on probation for two years (L.F. 36-37; Tr. 114, 117). This issue is properly preserved for appeal.

The State's Burden of Proof and Risk of Nonpersuasion

The state bears the burden of going forward with the evidence, as well as bearing the risk of nonpersuasion if it fails to establish by a preponderance of the evidence that a motion to suppress should be overruled. *Grayson*, 336 S.W.3d at 142; *State v. Franklin*, 841 S.W.2d 639, 644 (Mo. banc 1992); Section 542.296.6 RSMo 2000. A search conducted without a valid search warrant is presumed to be unreasonable unless it is

shown to fall within one of the exceptions to the warrant requirement; the state bears the burden to show that the search comes within such an exception. *State v. Schmutz*, 100 S.W.3d 876, 880 (Mo. App. S.D. 2003); *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990); Section 542.296.6.

The Fourth Amendment

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures. *State v. West*, 58 S.W.3d 563, 568 (Mo. App. W.D. 2001). It has been incorporated into the Fourteenth Amendment and applies to the States. *Mapp v. Ohio*, 367 U.S. 643 (1961). Article I, Section 15 of the Missouri Constitution is co-extensive with the Fourth Amendment. *West*, 58 S.W.3d at 568. A person is seized when, under the totality of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Grayson*, 336 S.W.3d at 143 (citations omitted).

The Fourth Amendment allows a brief investigative detention if a law enforcement officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.” *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Grayson*, 336 S.W.3d at 143. In such instance, the officer may briefly stop the suspicious person and make “reasonable inquiries” aimed at confirming or dispelling his suspicions. *Terry*, 392 U.S. at 30. A *Terry* stop is valid only so long as it is “based on reasonable suspicion supported by articulable facts that the person stopped is engaged in criminal activity.” *Grayson*, 336 S.W.3d at 143; quoting, *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999). Law enforcement authorities must be able to articulate more than just

an inchoate and unparticularized suspicion or “hunch.” *Terry*, 392 U.S. at 30; *Schmutz*, 100 S.W.3d at 880. A suspicion is reasonable when, in light of the totality of the circumstances, the officer is able to point to specific and articulable facts which, taken together with the rational inference from those facts, reasonably warrant the intrusion. *Terry*, 392 U.S. at 21; *Grayson*, 336 S.W.3d at 143; *Long*, 303 S.W.3d at 201-202.

Officers are allowed to perform a brief investigatory stop of persons engaged in ambiguous conduct that could be considered criminal or innocent. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). But if the officers do not “learn facts rising to the level of probable cause, the individual must be allowed to go on his way.” *Id.* at 126.

An investigative detention must be temporary and last no longer that is necessary to effectuate the purpose of the stop, and the methods employed should be the least intrusive available to verify or dispel the officer’s suspicion in a short period of time. *Grayson*, 336 S.W.3d at 145; *quoting*, *Florida v. Royer*, 460 U.S. 491, 500 (1983). If the detention extends beyond the time necessary to effect its initial purpose, the seizure may lose its lawful character unless new facts supporting reasonable suspicion are found during the period of lawful seizure. *Grayson*, 336 S.W.3d at 145-146; *quoting*, *State v. Slavin*, 944 S.W.2d 314, 317-318 (Mo. App. W.D. 1997).

In *State v. Waldrup*, 331 S.W.3d 668, 670 (Mo. banc 2011), the defendant was a passenger in a car that was stopped at a driver’s license checkpoint. As the car approached the checkpoint, Mr. Waldrup noticed the officers and his eyes opened wide and his mouth hung open; additionally, the officers saw Mr. Waldrup duck very far into the floorboard, as if he was reaching for something or hiding something down around his

feet. *Waldrup*, 331 S.W.3d at 670. As one officer approached the driver's side of the car, another officer approached Mr. Waldrup's side. *Id.* at 671. Mr. Waldrup was asked to get out of the car and he complied. *Id.* The officer conducted a pat-down search and asked Mr. Waldrup questions to determine his identity. *Id.* The officer indicated that he was not certain that Mr. Waldrup was no longer a threat and that Mr. Waldrup appeared to be under the influence or suffering from a mental or physical disability. *Id.* A radio check revealed that Mr. Waldrup had several warrants, and the troopers arrested Mr. Waldrup and found cocaine base stuffed inside his right shoe. *Id.* Mr. Waldrup filed a motion to suppress on the ground that the purpose of the checkpoint stop had been fulfilled and that the continued detention and computer check were not justified. *Id.* The trial court overruled his motion to suppress. *Id.*

On appeal, this Court held that Mr. Waldrup's continued detention was a reasonable seizure because the officers had a lawful basis for the initial stop and, having observed the reaching under the front passenger seat, had a continued concern about the presence of a weapon; that concern justified prolonging the defendant's stop for the officers' safety. *Id.* at 673-674. The officers in *Waldrup* testified to specific articulable facts that in their experience suggested that criminal activity was afoot that required investigation, and one officer testified that his initial contact with Mr. Waldrup had not dispelled his suspicions. *Waldrup*, 331 S.W.3d at 673, 675. Because reasonable suspicion remained, this Court found that the continued detention was reasonably within the scope of the investigation. *Id.* at 675-676.

Analysis

This case is distinguishable from *Waldrup*. Once the officers in this case determined that Mr. Lovelady had a toy gun, the officers no longer had any reasonable suspicion that Mr. Lovelady was currently involved in criminal activity. The evidence introduced at the hearing on the motion to suppress, and relied on at trial, did not establish a specific, articulable set of facts that would justify continuing to detain Mr. Lovelady after he had been disarmed and his gun was found to be a toy.

Officer Chris Smith and his partner, Officer Chad Fenwick, were on patrol on the Saturday night of Memorial Day weekend, 2009, in the area of 11th and Agnes in Kansas City (Tr. 7-9, 20, 54, 56-57). In Officer Fenwick's opinion, that area had a lot of drugs, guns, prostitution and crime (Tr. 57-58). While on patrol, the officers saw Mr. Lovelady on a bicycle, riding in leisurely circles in the intersection at 11th and Agnes (Tr. 9, 10, 20, 59). Mr. Lovelady lived in the same block, at 1021 Agnes (Tr. 20-21). As the officers drove closer, Officer Smith could see something sticking out of the side of Mr. Lovelady's waistband (Tr. 10).

Officer Smith made eye contact with Mr. Lovelady, and Mr. Lovelady's movement caught Smith's attention (Tr. 10, 21, 34-35). Officer Smith heard Mr. Lovelady say, "They went that way", then Mr. Lovelady pointed west down 11th Street (Tr. 10-11, 13). When Mr. Lovelady moved his hands, Officer Smith saw that the item sticking out of his waistband appeared to be a gun (Tr. 11-12, 13, 21). Mr. Lovelady was not pointing the gun at anyone or doing anything dangerous with it (Tr. 23).

The officers got out of their car, drew their guns on Mr. Lovelady, and told him to get on the ground (Tr. 11-12, 13-14, 23, 62). Mr. Lovelady immediately complied and lay down on the ground (Tr. 12m 23-25). Officer Smith took the gun from Mr. Lovelady's waistband and then put Mr. Lovelady in handcuffs (Tr. 11-12, 14-15, 24-25). Mr. Lovelady was cooperative with the officers (Tr. 24-25, 62-63). Officer Smith recalled that Mr. Lovelady seemed to be under the influence of "some kind of foreign substance to his body" (Tr. 12-13, 24-25, 63), but Officer Smith did not document that observation in his police report (Tr. 53).

Having detained and disarmed Mr. Lovelady, the officers immediately examined the "gun" and determined that it was an Airsoft gun (L.F. 13, 33; Tr. 16-17, 26, 28). An Airsoft gun fires plastic BBs but does not use gunpowder (Tr. 16-17, 26, 28). An Airsoft gun is a toy gun, not designed to be lethal, and it is not illegal to have a toy gun (Tr. 26-27, 28, 73).

The officers took Mr. Lovelady, in handcuffs, to the front of their patrol car (Tr. 14-15). Mr. Lovelady was not released or told that he was free to go (Tr. 45). The officers asked Mr. Lovelady some more questions to determine whether he had actually seen anything the officers should know about, but Mr. Lovelady was not able to describe anything (Tr. 15).

Officer Smith admitted that he intended on detaining Mr. Lovelady to check for warrants and to get more information about him, regardless of whatever Mr. Lovelady told him (Tr. 41-42). The officers conducted a computer check and learned that Mr. Lovelady had a pickup order (Tr. 15, 29).

Once the officers learned of the pickup order, they put Mr. Lovelady under arrest and searched him for other weapons or illegal substances (Tr. 16). Officer Smith found a white rock substance and a kitchen knife in Mr. Lovelady's pockets (Tr. 16). The officers called a supervisor to come and field test the white rock substance (Tr. 17). The substance tested positive for the presence of cocaine (Tr. 18).

The officers were not justified in continuing to detain Mr. Lovelady once they determined that he was not carrying a lethal weapon, and the trial court erred in overruling his motion to suppress the physical evidence. The officers' sole basis for stopping and seizing Mr. Lovelady was that he appeared to have a gun on his person (Tr. 40-41, 64-65). The trial court found that the officers had already determined that the gun was a toy *before* they requested a warrant check (Tr. 13, 33). The dashcam video confirms this order of events (Def. Ex. 3).

Unlike in *Waldrup*, in this case no new articulable facts were developed during the period of initial detention that would suggest that criminal activity was afoot. Even though it was unusual to see someone riding a bicycle in that area at night (Tr. 72), such activity was not illegal. Nothing about the fact that Mr. Lovelady was riding in "leisurely circles" in the intersection (Tr. 9, 10, 20) was sufficient to support a reasonable suspicion that criminal activity was afoot. Mr. Lovelady did not ride away when the police car approached him, and the officers did not claim to see Mr. Lovelady doing anything illegal. The officers did not claim that anyone else was in the area with Mr. Lovelady. All they saw was a man riding a bicycle, on the Saturday night of Memorial Day weekend, around an intersection (Tr. 9, 10, 20, 54). Nothing about the scenario could

have given rise to a reasonable suspicion of criminal activity. The only reason to stop Mr. Lovelady was that he appeared to have a gun on his person (Tr. 40-41, 64-65).

That the area was known for crime, drugs, and prostitution (Tr. 57-58) did not lead to the conclusion that Mr. Lovelady was engaged in criminal activity. The presence of individuals in a high crime or known drug area is not a sufficient basis for concluding that a person is engaged in criminal conduct. *Brown v. Texas*, 443 U.S. 47, 52-53 (1979); *State v. Hawkins*, 137 S.W.3d 549, 557-58 (Mo. App. W.D. 2004).

Officer Smith said that Mr. Lovelady seemed to be “under the influence” (Tr. 12-13, 24-25), but neither officer claimed that he was acting in a disorderly manner, nor did they testify that they stopped Mr. Lovelady for being or seeming to be intoxicated. The sole reason for the stop that the officers saw what they thought was a gun (Tr. 40-41, 64-65). The concern that Mr. Lovelady might have a gun was quickly dispelled after the officers ordered Mr. Lovelady to the ground at gunpoint and handcuffed him. Once Mr. Lovelady was disarmed, it was readily apparent to the officers that he was not in possession of an actual weapon and that there was no reasonable suspicion that Mr. Lovelady was engaged in some type of criminal activity. The officers should have released Mr. Lovelady without further ado.

This case is similar to *State v. Taber*, 73 S.W.3d 699 (Mo. App. W.D. 2002). The police stopped Ms. Taber under the reasonable suspicion that she was violating Missouri vehicle licensing and registration laws, because her vehicle and trailer did not have front license tags. *Taber*, 73 S.W.3d at 99. Upon stopping Ms. Taber, the officer noticed that her vehicle and trailer had Kansas license plates; he knew that Kansas does not require

front license plates. *Id.* at 702. A license and record check of her identification revealed an arrest warrant, and a search incident to arrest found marijuana in her purse. *Id.* The state conceded that the purpose of the officer's stop of Ms. Taber was complete once he realized that her vehicle had a valid Kansas license plate; the state also conceded that the officer had no authority to further detain her, because he did not have a reasonable suspicion that she was engaged in criminal conduct. *Id.* at 704-706. The Court of Appeals, Western District, found that a motorist in Ms. Taber's position would not have believed that she was free to leave, so the continuation of the stop was not consensual. *Id.* at 706-707. Because the continued detention of Ms. Taber was not consensual, it was unlawful, because the officer's basis for reasonable suspicion had been dispelled. *Id.* at 706-707.

As in *Taber*, the officers in this case arguably had an articulable basis for reasonable suspicion to justify the initial stop, but that suspicion was dispelled *before* the officers conducted the warrant check. *Taber*, 73 S.W.3d at 701-702. No new facts were developed *during* the initial stop to justify continuing to detain Mr. Lovelady. Despite the lack of new facts to justify continuing the detention, Officer Smith intended to detain Mr. Lovelady to check for warrants, regardless of whatever Mr. Lovelady might tell him (Tr. 41-42). Officer Smith's testimony demonstrates that the continued detention and the computer check were a fishing expedition and were not justified by specific, articulable facts that would support a reasonable suspicion.

The officers were not justified in continuing to detain Mr. Lovelady after they disarmed him of his toy gun. At that point, it was clear that he did not possess a real

weapon, thus disposing of the reason the officers had stopped him. All evidence obtained as a result of the illegal detention must be excluded; thus, the trial court erred in overruling the motion to suppress and in admitting the evidence at trial. *Taber*, 73 S.W.2d at 707; *Arizona v. Evans*, 514 U.S. 1 (1995).

Mr. Lovelady respectfully requests that the Court reverse and vacate his conviction and sentence for possession of a controlled substance and remand the case to the circuit court with instructions to order the cocaine base and resulting testimony suppressed.

CONCLUSION

Based on the foregoing Argument, Tyoka Lovelady respectfully requests that this Court reverse and vacate his conviction and sentence for possession of a controlled substance and remand the case to the circuit court with instructions to order the cocaine base and resulting testimony suppressed.

Respectfully submitted,

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Certificate of Compliance and Service

I, Susan L. Hogan, hereby certify as follows:

1. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, this brief contains 5,278 words. This brief does not exceed the 31,000 words allowed for an appellant's brief.

2. This brief has been scanned for viruses using a Symantec Endpoint Protection program, which the Public Defender System updated on July 25, 2013. According to that program, the electronically-filed copy provided to this Court and to the Attorney General is virus-free. This brief was completed and electronically filed on July 25, 2013.

3. A true and correct copy of this brief was sent through the e-filing system on July 25, 2013, to Evan Bucheim, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, at evan.bucheim@ago.mo.gov

/s/ Susan L. Hogan

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